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19599—33

# In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 547

NEW COLONIAL ICE COMPANY, INC., PETITIONER

*v.*

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT

### OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 63–66) is reported in 24 B.T.A. 886. The opinion of the Circuit Court of Appeals (R. 79–83) is reported in 66 F. (2d) 480.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 24, 1933 (R. 84). Petition for a writ of certiorari was filed October 24, 1933. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Where a newly organized corporation with capital structure substantially the same as an existing corporation, takes over, in exchange for a portion of its capital stock, all the assets and liabilities of the old corporation, and such capital stock is distributed by the old corporation to its stockholders share for share, should the new corporation be treated as the same taxpayer as the old for the purpose of applying the net loss provisions of Section 204 of the Revenue Act of 1921?

## STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 11–12.

## STATEMENT

Prior to 1922, Colonial Ice Corporation, a New York corporation, with an authorized capital of $750,000, divided into 6,500 shares of preferred stock of $100 par value and 20,000 shares of common stock of $5 par value (R. 53), owned an ice plant and had entered into extensive contracts for the alteration and improvement of its buildings and machinery (R. 53–54). A large number of shares of its stock had been issued without consideration and without any record having been kept showing the parties to whom such stock had been

issued (R. 54). It became financially involved (R. 54), and during 1922 a Creditors' Committee took charge (R. 54) and formed a new corporation, the petitioner, with a capitalization the same as the old except that the new corporation had 500 less preferred shares (R. 60). The old corporation procured the surrender and cancelation of all recorded stock certificates which had been improperly issued, leaving outstanding 3,385 shares of preferred and the same number of shares of common stock which had been legally issued and recorded (R. 55). The assets and liabilities of the old corporation were transferred to the new (R. 60) and the new corporation issued 3,385 shares of its preferred stock to the old corporation, which corporation thereupon assigned and redelivered the certificate back to the new corporation with direction that the certificate be canceled and the stock reissued to such persons as the old corporation might direct (R. 60). Three thousand, three hundred and eighty-five shares of common stock of the new corporation were issued to Voting Trustees, who issued a certificate for a like number of shares to the old corporation, which corporation assigned and redelivered said certificate to the Voting Trustees, with directions to issue Voting Trustees' certificates to such persons as the old corporation might direct (R. 60–61). The stockholders of the old corporation, with the exception of some owning 247 shares of each class of stock, surrendered their stock in the old corporation and

received preferred stock and voting-trust certificates of common stock in the new corporation, share for share. The old corporation retired and canceled the preferred and common stock so surrendered (R. 61). The owners of the 247 shares of preferred and a like number of common stock of the old corporation had not surrendered the stock up to December 31, 1922 (R. 61–62).

During the period from April 14 to December 31, 1922, petitioner had a net income of $48,763.43 (R. 63), and during the calendar year 1923 it had a net income of $56,242.55 (R. 63). For the years 1922 (R. 34) and 1923 (R. 42) petitioner and the old corporation filed consolidated returns. In the 1922 consolidated return they reported a net income of $34,051.93 and claimed a deduction for net loss of $40,676.52 alleged to have been sustained by the old corporation in 1921,[1] thus reporting a net loss of $6,624.59 (R. 34), which they sought to carry forward and use as a deduction from the new corporation's net income in 1923 (R. 34).

The Commissioner of Internal Revenue disallowed the deduction for the loss sustained by the old corporation in 1921 (R. 32), but appears to have allowed the new corporation the benefit of the loss sustained by the old corporation for the period January 1 to April 13, 1922[2] (R. 16). Petitioner ap-

[1] The actual net loss of the old company for that year was $36,093.19 (R. 62–63).

[2] It is agreed that for that period the old corporation sustained a loss of $10,338.90. (R. 63.)

pealed from the Commissioner's determination to the Board of Tax Appeals (R. 3–12), contending that the Commissioner erred in refusing to allow it the benefit of the net loss sustained by the old corporation in 1921 (R. 4). In his answer the Commissioner claimed an additional deficiency for the period April 14 to December 31, 1922, on the ground that petitioner was not entitled to deduct the loss sustained by the old corporation during the period January 1 to April 13, 1922 (R. 16).

The Board of Tax Appeals held that the two corporations were not entitled to file a consolidated return (R. 63–65) and that the two corporations were separate taxpayers (R. 65–66). Accordingly, it refused to allow petitioner the benefit of the net losses sustained by the old corporation. (R. 66.) This holding was sustained by the Circuit Court of Appeals. (R. 81–83.)

Petitioner seeks to bring to this Court the question whether the two corporations were separate taxpayers in such a sense as to preclude the new corporation from having the benefit of the old corporation's net losses (Pet., p. 5).

## DISCUSSION

Subsection (a) of Section 204, *infra,* prescribes the formula for determining net losses, and subsection (b) provides that where "any taxpayer has sustained a net loss" the amount thereof may be carried forward and—

> * * * deducted from the net income of *the taxpayer* for the succeeding taxable year;

> and if such net loss is in excess of the net income for such succeeding taxable year, the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year; * * *. (Italics ours.)

It will be observed that the statute specifically limits the use of a "net loss" to the "net income of the taxpayer" who sustained such net loss. *Woolford Realty Co.* v. *Rose,* 286 U.S. 319, 328–329; *Commissioner* v. *Ben Ginsburg Co.,* 54 F. (2d) 238, 239 (C.C.A. 2d). Thus the question here presented is whether the petitioner is the same taxpayer as the old corporation.

While the decision of the Circuit Court of Appeals holding that it is not, is in accordance with well-established principles of law (*Burnet* v. *Commonwealth Improvement Co.,* 287 U.S. 415, 419–420; *Dalton* v. *Bowers,* 287 U.S. 404, 410; *Athol Mfg. Co.* v. *Commissioner,* 54 F. (2d) 230, 231 (C.C.A. 1st); *Swedish Iron & Steel Corp.* v. *Edwards,* 1 F. Supp. 335, 338 (S.D. N.Y.); *Insurance & Title Guarantee Co.* v. *Commissioner,* 36 F. (2d) 842 (C.C.A. 2d), certiorari denied, 281 U.S. 748; *Burnet* v. *Riggs Nat. Bank,* 57 F. (2d) 980, 983 (C.C.A. 4th)), it seems to be in conflict with the decisions of the Circuit Court of Appeals for the Sixth Circuit in *Pioneer Pole & Shaft Co.* v. *Commissioner,* 55 F. (2d) 861, and *H. H. Miller Industries Co.* v. *Commissioner,* 61 F. (2d) 412, and with the decision of the Circuit Court of Ap-

peals for the Third Circuit in *Phillips* v. *Lyman H. Howe Flms Co.*, 33 F. (2d) 891.

In *Pioneer Pole & Shaft Co.* v. *Commissioner*, the petitioner was organized as a New Jersey corporation in 1902. Thereafter it took over the business and assets of 14 companies and issued corporate stock in exchange for "goodwill." In 1911 an Ohio corporation by the same name was organized and took over all of the assets and assumed all of the liabilities of the New Jersey corporation. There was no change in the capital structure or respective stockholders' interests. In determining the company's income tax for the fiscal year ended July 31, 1919, the Commissioner refused any allowance for goodwill as an item of invested capital. Before the Board of Tax Appeals, the value of the goodwill as of 1902 was established, but there was no proof that stock was issued for goodwill in 1911, or of the value of goodwill received by the Ohio corporation. The Circuit Court of Appeals held that there was substantial identity between the two corporations and that that was all that was necessary to make the two corporations one for the purpose of applying Sections 311 and 326 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1090, 1092, relating to "invested capital."

If the successor corporation in that case was properly regarded as the same corporation as its predecessor for the purpose of applying the invested capital provisions of the Revenue Act of

1918, we hesitate to contend that the decision is not authority for the proposition that petitioner herein is the same corporation as its predecessor for the purpose of applying the net loss provisions of Section 204, *supra*.

In *H. H. Miller Industries Company* v. *Commissioner, supra,* an Ohio corporation was organized as the successor to a New Jersey corporation. All the assets of the New Jersey corporation were transferred to the Ohio corporation and the latter's shares exchanged for those of the former, share for share. The name and capital structure of the two corporations were identical. The stockholders remained the same. Among the assets transferred by the old corporation to the new was a patent for an ice-cream freezer which had been issued to the old corporation in 1910. In its return for 1921 the new corporation claimed as a deduction an amount representing exhaustion of the patent measured by its March 1, 1913, value, instead of the cost to the new corporation. In holding that the March 1, 1913, value governed, the Circuit Court of Appeals said (p. 413), "Where reorganization involves no change in capital structure, the new corporation is considered substantially a continuation of the old." Thus this decision is similar to the *Pioneer Pole & Shaft Co.* decision, *supra.*

In *Phillips* v. *Lyman H. Howe Films Co., supra,* the Lyman H. Howe Attractions Company and the Lyman H. Howe Films Company were incorporated in 1914. On August 26, 1921, the Lyman H.

Howe Attractions Company filed its income-tax return for the fiscal year ended June 30, 1921, which return disclosed no tax liability. On August 26, 1921, the Lyman H. Howe Films Company filed its income-tax return for the same period, disclosing a tax liability of $4,066.10. Upon audit of this return the Commissioner determined an overpayment of $4,066.10. On February 7, 1922, both companies were merged into a new company with the name Lyman H. Howe Films Company. On March 29, 1926, the new company filed a waiver for and on behalf of the original Lyman H. Howe Films Company, purporting to extend the time during which additional assessments for the fiscal year ended June 30, 1921, could be made. The question presented was whether such waiver was filed by the "taxpayer" within the meaning of Section 284 (g) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 67, which provides in part:

> If the *taxpayer* has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid. * * * (Italics ours.)

The old company did not owe any tax for which the new company became liable, so that the new company might be called "the taxpayer," as held by

this Court in *United States* v. *Updike*, 281 U.S. 489, 494. Consequently it would seem that if the distinction between corporate entities is to be preserved the new company could in no sense be called "the taxpayer." But if the two companies were properly treated as the same "taxpayer" within the meaning of Section 284 (g), *supra*, it is difficult to see any reason why the two corporations here involved should not be treated as the same "taxpayer" for the purpose of applying the provisions of Section 204 of the Revenue Act of 1921.

In the court below we did not attempt to distinguish these cases,[3] but contented ourselves with saying that we believed them to have been incorrectly decided.

The question presented is one that is constantly recurring in the courts, and therefore it may not be said that the question is not of importance. In view of this fact and of the apparent conflict between the decision in the instant case and the decisions referred to above, we do not oppose the granting of the petition.

Respectfully submitted.

J. CRAWFORD BIGGS,
*Solicitor General.*
SEWALL KEY,
JOHN H. MCEVERS,
*Special Assistants to the Attorney General.*

NOVEMBER 1933.

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[3] *Phillips* v. *Lyman H. Howe Films Co.*, *supra*, was not cited.

## APPENDIX

The Revenue Act of 1921, c. 136, 42 Stat. 227, 231, provides in part:

> SEC. 2. That when used in this Act—
>
> (1) The term "person" includes partnerships and corporations, as well as individuals:
>
> * * * * *
>
> (9) The term "taxpayer" includes any person, trust or estate subject to a tax imposed by this Act;
>
> * * * * *
>
> SEC. 204. (a) That as used in this section the term "net loss" means only net losses resulting from the operation of any trade or business regularly carried on by the taxpayer (including losses sustained from the sale or other disposition of real estate, machinery, and other capital assets, used in the conduct of such trade or business); and when so resulting means the excess of the deductions allowed by section 214 or 234, as the case may be, over the sum of the following: (1) the gross income of the taxpayer for the taxable year, (2) the amount by which the interest received free from taxation under this title exceeds so much of the interest paid or accrued within the taxable year on indebtedness as is not permitted to be deducted by paragraph (2) of subdivision (a) of section 214 or by paragraph (2) of subdivision (a) of section 234, (3) the amount by which the deductible losses

not sustained in such trade or business exceed the taxable gains or profits not derived from such trade or business, (4) amounts received as dividends and allowed as a deduction under paragraph (6) of subdivision (a) of section 234, and (5) so much of the depletion deduction allowed with respect to any mine, oil or gas well as is based upon discovery value in lieu of cost.

(b) If for any taxable year beginning after December 31, 1920, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be deducted from the net income of the taxpayer for the succeeding taxable year; and if such net loss is in excess of the net income for such succeeding taxable year, the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year; the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary.

* * * * *

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